(12)

No. 97-1536

In The

Supreme Court of the United States

October Term, 1997

STATE OF ARIZONA ex rel.
Arizona Department of Revenue,

Petitioner,

v.

BLAZE CONSTRUCTION COMPANY, INC.,

Respondent.

On Writ Of Certiorari To The Arizona Court Of Appeals, Division One

BRIEF *AMICI CURIAE* OF FRANK ADSON, ANITA AHHAITTY, VANESSA GOODEAGLE, ALVIN MOORE, DENISE MOORE, RANDALL TIGER AND SAMUEL VETER IN SUPPORT OF THE RESPONDENT

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INTEREST OF AMICI[1]

Amici are seven members of federally recognized tribes who live and work within Indian country, though not necessarily that of their own tribes. Several are married to members of other federally recognized tribes and live with their spouses on trust land within the jurisdiction of their spouses' tribes. The others live within their own tribe's jurisdiction but are employed by the Indian Health Service on land held in trust for another tribe. The State of Oklahoma taxes the income of *Amici* because they do not both live and work within Indian country under the jurisdiction of their own tribes. *Amici* have challenged the state income taxes based on the Indian preemption doctrine, and a decision by the Administrative Law Judge of the Oklahoma Tax Commission in that case is pending.

This Court's application and construction of the Indian preemption doctrine in this case involving state taxation of non-member Indians[2] within Indian country will impact *Amici*'s case. *Amici* thus have a substantial interest in the outcome of the Court's analysis and

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[1] Counsel for Petitioners and Counsel for Respondents have consented to the filing of the Brief Amicus Curiae. The consents are submitted for filing herewith.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than Amicus Curiae, its members or its counsel made a monetary contribution to the preparation and submission of this brief.

[2] The term non-member Indian as used in this brief describes Indians within the Indian country of another tribe. The term does not include Indians who are not members of federally recognized tribes.

respectfully submit this brief to assist the Court in properly applying and construing the Indian preemption doctrine.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent, Blaze Construction Company, Inc., (hereinafter "Blaze"), is a wholly Indian-owned company incorporated under the laws of the Blackfeet Tribe, a federally recognized Indian tribe. Blaze contracted with the Bureau of Indian Affairs to construct and repair reservation roads for six Indian tribes within Arizona. The roads, though public, are located on trust land and primarily serve local Indian communities, providing the Indian residents of the communities access to local tribal government offices, schools, and homes. Petitioner, the State of Arizona ex rel. Arizona Department of Revenue, (hereinafter "State"), seeks to impose a transaction privilege tax on Blaze for the reservation road work. The State seeks to impose this tax even though it provides Blaze with no specific services in connection with road construction and repairs, plays no role in planning or issuing permits for the projects, and provides no maintenance or police protection on the roads. Using the Indian preemption doctrine, a doctrine that ascertains congressional intent by examining the competing interests of the Federal Government, the Tribe and the State, the Arizona Court of Appeals struck down the tax.

The State insists that the Indian preemption doctrine is inapplicable in the present case, however, because the contract for reservation road work was made between the

federal government and a non-member Indian. In the State's view, because the tribe was not a direct party to the contract, there is no direct infringement of tribal sovereignty and hence, this case should be analyzed under preemption principles applicable outside the area of federal Indian law. These non-Indian preemption principles require an express exemption from taxation by Congress, which, the State argues is not present here. The State alternatively argues that even if the Indian preemption doctrine does apply here, the State's taxes on Blaze are not preempted.

The State's position regarding the application of the Indian preemption doctrine is untenable. Under this Court's cases, the Indian preemption doctrine applies to transactions or activities occurring in Indian country, regardless of whether a tribe is a direct party to the underlying transaction or activity. The State here erroneously ignores the critical territorial component that triggers the application of federal Indian law principles such as the Indian preemption doctrine. Moreover, the State's overemphasis on infringement on tribal sovereignty in effect collapses the two independent barriers to state jurisdiction in Indian country – Indian preemption and infringement on tribal sovereignty – into a single test. That is unfounded and directly contrary to this Court's law. Because all relevant activity in the instant case took place within Indian country, the Arizona Court of Appeals was correct in applying the Indian preemption doctrine in the case.

The Court of Appeals was likewise correct in finding the taxes at issue here to be preempted. Pertinent federal

legislation and policies show the important federal interests at stake here: there is a specific comprehensive statutory and regulatory scheme governing reservation road work; federal policy treats all Indians, including non-member Indians such as Blaze, within Indian country equally for purposes of jurisdiction; and federal policy encourages economic development by Indians in Indian country, including development by non-member Indians. These federal policies are bolstered by the fundamental interests of tribes in achieving federally promoted self-government and economic development free from state interference. The State tax here interferes with all of these federal and tribal policies and interests. Significantly, the State provides no direct services in connection with Blaze's road work on the reservations that would justify such interference. The analysis of competing federal, tribal and state interests called for by the Indian preemption doctrine fully supports the Court of Appeals' holding that state taxing jurisdiction in this case is preempted.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE INDIAN COUNTRY PREEMPTION DOCTRINE APPLIES TO THIS CASE, WHICH ARISES IN INDIAN COUNTRY[3]

The State's argument that the Indian preemption doctrine is inapplicable to this case hinges on the fact that no tribe or tribal member was a direct party to the contract for the reservation road work that the State seeks to tax. *See* Pet. Br. at 16; Br. of the United States as Amicus Curiae at 8. While that fact is true, it does not pull this case out from under the Indian preemption doctrine. The Indian preemption doctrine does apply here, because of an overriding and undisputed fact – the existence of

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[3] "Indian country" is the geographic area in which tribal sovereignty generally operates and is defined by statute as follows:

> [t]he term "Indian country," . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through same.

18 U.S.C. § 1151. Though the definition is contained in a criminal statute, it applies in the civil context as well. *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 (1987).

Indian country as the geographic area within which the State seeks to impose its tax.

A. Because the State is Attempting to Assert Taxing Jurisdiction Over Activities Taking Place Wholly Within Indian Country, the Indian Preemption Doctrine Applies

This Court has long recognized that the principles of federal Indian law are triggered primarily by the existence of "Indian country," a land base or geographic territory within which "primary jurisdiction . . . rests with the Federal Government and the Indian tribe inhabiting it, and not with the States," *Alaska v. Native Village of Venetie Tribal Government*, 118 S.Ct. 948, 952 n.1 (1998), and within which state jurisdiction "is quite limited." *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2, 446 (1975). *See* 18 U.S.C. § 1151. Application of federal Indian law principles within Indian country arises from the tenet that there is a "significant territorial component to tribal sovereignty." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980). Under the earliest pronouncements of the Supreme Court, Chief Justice Marshall held that Indian nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive" and within which "the laws of [a State] can have no force." *Worcester v. Georgia*, 31 U.S. 515 (6 Pet.) 557, 561 (1832). Although the Supreme Court has since departed from *Worcester's* absolute bar against state jurisdiction within Indian country, this Court continues to recognize that:

> . . . in demarcating the respective spheres of state and tribal authority over Indian reservations . . . Indian tribes are unique aggregations possessing "attributes of sovereignty over both their members *and their territory*" [and that] . . . [b]ecause of their sovereign status, tribes *and their reservation lands* are insulated in some respects by a 'historic immunity from state and local control. . . . "

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983) (citations omitted) (emphasis added). In short, this Court still firmly recognizes the distinct boundaries of Indian country, and the special jurisdictional rules that apply within that territory.

It is undisputed that the State here is attempting to impose its tax on activities within Indian country, specifically, activities within the boundaries of nine Indian reservations within the State of Arizona: the Navajo, Hopi, Fort Apache, Colorado River, Papago (Tohono O'odham), and San Carlos Indian Reservations. *See* Joint App. at 14-21. Because all activity takes place within Indian country, indeed all takes place on trust land, the principles of federal Indian law are triggered.[4] In this case, the relevant principle of Indian law for determining

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[4] Affirming that the Indian preemption doctrine arises from the territorial component of tribal sovereignty, this Court has stated that "[t]ribal reservations are not states, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of preemption that are properly applied to the other." *Bracker*, 448 U.S. at 143.

state taxing jurisdiction is the Indian preemption doctrine. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).[5]

B. The Lack of a Tribal Party or of a Showing of Direct Infringement on Tribal Sovereignty Does Not Defeat the Application of the Indian Preemption Doctrine

Under federal Indian law principles there are two barriers to the assertion of state jurisdiction within Indian country: "First, the exercise of such authority may be preempted by federal law. . . . Second, it may unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.' " *Bracker*, 448 U.S. at 142 (citations omitted). Although the infringement barrier and the Indian preemption barrier are related, this Court

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[5] Were there no Indian country involved here, the State and the United States would be right in calling for an explicit congressional statement as required under the rules of non-Indian preemption. *See* Pet. Br. at 13-18. For example, even where Indians themselves go outside of Indian country, this Court has held that nondiscriminatory state laws apply absent explicit congressional statements to the contrary. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973); *Bracker*, 448 U.S. at 144 n.11. *See also Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995) (allowing state income taxes on Indians residing outside of Indian country).

However, where activity takes place within Indian country, this Court has consistently applied the "particularized inquiry" of the Indian preemption doctrine. *See, e.g., Bracker*, 448 U.S. 136 (non-Indian logging company operating within Fort Apache Reservation); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (non-Indian lessees within Jicarilla Apache Reservation).

has admonished that they are two separate and independent barriers to the assertion of state jurisdiction. *See Bracker*, 448 U.S. at 143.

The State misapprehends the separateness of these tests when it argues that the Indian preemption doctrine does not apply because tribal interests are not implicated where only the federal government and a non-member are parties to the contract in question. Pet. Br. at 16. The State's overemphasis on a direct infringement on tribal sovereignty, which in the State's view is absent where the tribe was not a party to the construction contract, in effect merges the two independent barriers to state jurisdiction within Indian country into one test. This approach has already once been firmly rejected by this Court.

As this Court clearly held in *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973), the doctrine of Indian preemption may invalidate a state tax regardless of a specific showing of direct infringement on tribal interests. In *McClanahan*, the question was whether a state had jurisdiction to tax the income of a Navajo member earning her income and living solely within the boundaries of the Navajo Reservation. The State argued, and the lower court held, that because the taxation fell on the individual, there was no infringement on the tribe's "right to self-government." *McClanahan v. Arizona Tax Comm'n*, 14 Ariz. App. 452, 455 (1971). Based on Indian preemption, this Court reversed. The Court held that even if it were to assume that no infringement on tribal sovereignty occurred, the activity at issue was "totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves. *Appellee cites us no cases holding that this legislation may be*

ignored simply because tribal self-government has not been infringed." 411 U.S. at 179-180. (emphasis added).

As in *McClanahan*, the State has no support for its argument that Indian preemption does not apply when tribal sovereignty has not been infringed. In the absence of such support, the clear law of this Court that Indian preemption applies where "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation," controls. *Bracker*, 448 U.S. at 144.

Adoption of the State's argument would require a new test for determining state jurisdiction, one that would focus exclusively on the identity of the parties, and allow state jurisdiction whenever transactions within Indian country concern exclusively non-members. *See* Pet. Br. at 17-18. This suggested test is wholly at odds with prevailing law, and must be rejected. As this Court's recent decision in *Strate v. A-1 Contractors*, 117 S.Ct. 1404 (1997), makes clear, the identity of the parties does not affect the applicability of federal Indian law principles. In *Strate*, the activity at issue arose within a reservation, however, as the Court noted, regarding the parties to the underlying activity at issue: "[n]either . . . is a member of the . . . Tribe [ ]or an Indian." 117 S.Ct. at 1408. Notwithstanding such facts, this Court applied the usual jurisdictional principles of federal Indian law in that case. In short, the status of the parties as members or non-members, though certainly bearing on the outcome of the case, had little, if any, bearing on the *application* of federal Indian law principles in Strate.

The same result is called for here. The precise principle of federal Indian law that the State seeks to avoid is

Indian preemption, a doctrine to which "[t]he Court has repeatedly acknowledged that . . . [the] . . . geographical component . . . remains highly relevant. . . . " *Bracker*, 448 U.S. at 151. Indian preemption, of course, differs from preemption outside the area of federal Indian law, especially in the area of taxation. *Id.* at 143. Under non-Indian law preemption, states generally may tax unless Congress has expressly provided for a tax exemption. *Id.* at 144. In Indian law, however, an express exemption is not necessary. Rather, courts must make a "particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 145; *see also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).

By ignoring the "highly relevant" existence of Indian country, the State's proffered rule would replace the balancing test with a flat presumption in favor of state taxation within Indian country, at least where no tribe or tribal members are direct parties to a transaction or activity. This extreme result is not justified when the balancing test is already designed to take into account all of the relevant factors, including the existence of Indian country, the status of the parties, and the relevant governmental interests. The court below properly refused to establish a new, unfounded, and unnecessary test for determining the validity of state taxation in Indian country.

II. THE COURT OF APPEALS CORRECTLY FOUND THAT UNDER THE INDIAN PREEMPTION DOCTRINE, THE TAXES AT ISSUE HERE ARE PREEMPTED

This Court has established a two part test for determining whether state jurisdiction is preempted under the Indian preemption doctrine. First courts must examine whether the assertion of state jurisdiction "interferes or is incompatible with federal and tribal interests reflected in federal law." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983). In reviewing the federal and tribal interests, courts must determine whether congressional intent to preempt can be inferred from the language or history of statutes and treaties as well as from the "broad policies that underlie the legislation and the history of tribal independence in the field at issue." *Cotton Petroleum*, 490 U.S. at 176. If there is interference, courts then must look at the state interests at stake to determine whether they are sufficient to justify the assertion of state authority.[6] *New Mexico v. Mescalero*, 462 U.S. at 334. In this case, there are substantial federal and tribal interests with which the asserted tax interferes and there is no justification for that interference.

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[6] In making each of these examinations, this Court has directed that, as in all instances of federal treaties and legislation impacting Indians, treaties and statutes must be "construed generously," *Bracker*, 448 U.S. at 144 and "ambiguities . . . resolved in favor of tribal independence." *Cotton Petroleum*, 490 U.S. at 177.

A. Federal and Tribal Interests

1. A Comprehensive and Exclusive Federal Regulatory Scheme Governs the Activity in Question

As Blaze argues and the Court of Appeals properly held, the road construction activities here are governed by a comprehensive and exclusive regulatory scheme which leaves no room for state taxation. *Amici* support Blaze's position that the statutory and regulatory scheme here is legally indistinguishable from those preemptive schemes involved in *Ramah Navajo School Bd., Inc. v. New Mexico*, 458 U.S. 832 (1982) and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and incorporate by reference Blaze's arguments on this point. *Amici* do, however, offer further elaboration on the following federal and tribal interests: the federal interest in treating Indians alike in Indian country, the federal interest in protecting Indian property and promoting Indian economic self-sufficiency, and the tribes' interest in governing its territory free from state intrusion.

2. The Federal Government Has an Interest in Treating Indians Alike Within Indian Country, Which Is Thwarted by the Imposition of a State Tax on Blaze, a Non-member Indian Contractor

The federal government has a clear policy, expressed in a wide variety of statutes, to treat Indians within Indian country alike. The Indian Major Crimes Act, 18 U.S.C. § 1153, which provides federal jurisdiction over certain offenses committed by Indians on Indian lands,

applies in the case of "any Indian . . . within the Indian country." 18 U.S.C. § 1153(a). As this Court has held, this specifically includes Indians who belong to "some other tribe" than the tribe on whose land the act was committed. *United States v. Kagama*, 118 U.S. 375, 383 (1886). The Snyder Act, 25 U.S.C. § 13, authorizes the provision of services "for the benefit, care, and assistance of the Indians throughout the United States," irrespective of residence or location. The Indian Reorganization Act of 1934, 25 U.S.C. § 461-479, defines Indian to include "all members of any recognized Indian tribe . . . residing within the present boundaries of any Indian reservation. . . . " 25 U.S.C. § 479. Also, and of particular relevance here, the federal government's interest in treating Indians alike in Indian country is clearly reflected in the Buy Indian Act, 25 U.S.C. § 47.[7] The Buy Indian Act authorizes the Secretary of the Interior to grant preference to Indian contractors for all purchases or contracts made by the Bureau of Indian Affairs (and the Indian Health Service). In granting this preference, absolutely no distinction is made between Indians based on affiliation with a particular tribe. As Congress stated, "Indian preference shall be applied to all Indians regardless of place

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[7] The Buy Indian Act provides in pertinent part:

> So far as may be practicable Indian labor shall be employed, and purchases of the products (including but not limited to printing, notwithstanding any other law) of Indian industry may be made in open market in the discretion of the Secretary of the Interior. . . .

25 U.S.C. § 47.

of enrollment. . . . " S. Rep. No. 100-4 (Jan. 27, 1987), *reprinted in* 1987 U.S.C.C.A.N. 66, 83.[8]

The most recent pronouncement of federal policy is found in legislation passed in response to this Court's holding in *Duro v. Reina*, 495 U.S. 676 (1990). In *Duro*, the Supreme Court distinguished between non-member Indians for purposes of determining tribal criminal jurisdiction and held that tribes did not have authority to assert criminal jurisdiction over non-member Indians. Shortly following the *Duro* decision, Congress amended the Indian Civil Rights Act by the Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077, 104 Stat. 1893 (codified as amended at 25 U.S.C. §§ 1301-1303 (1997 Supp.)) (hereinafter "ICRA amendments"), to state that " 'Indian' means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153 of Title 18 if that person were to commit an offense listed in that section in Indian country to which that section applies," 25 U.S.C. § 1301(4), and that "the inherent power of an Indian tribe [is], hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." § 1301(2).[9] These amendments thus affirmed

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[8] This quote was found in the legislative history to the Surface Transportation Assistance Act, P.L. 97-424 (1982), an act which contained language authorizing the BIA to employ Indian preference in awarding contracts pursuant in response to this Court's holding in *Andrus v. Glover Construction Company*, 446 U.S. 608 (1980), that the Secretary of the Interior was barred from granting Indian preference under the Buy Indian Act for prime road construction contracts.

[9] While the amendments were meant to be temporary, they were made permanent by the Act of Oct. 28, 1991, Pub. L. No.

that tribes exercise criminal jurisdiction over all Indians including non-Indians within the Indian country under their jurisdictions.[10]

Following enactment of the ICRA amendments there can be no question of Congress' intent to treat Indians within Indian country alike. The basis for this similar treatment arises from the history of Indians within Indian country. As the legislative history of the ICRA amendment explained:

102-137, 102d Cong., 1st Sess. *See* Nell Jessup Newton, *Permanent Legislation to Correct Duro v. Reina*, 17 Am. Indian L.Rev. 109, 117 (1992).

[10] *Amici* recognize that this Court in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), specifically declined to find that the policy of treating all Indians alike as expressed in the Major Crimes Act and the Indian Reorganization Act preempted state taxes on non-member Indians within Indian country. 447 U.S. at 160-161. *Amici* respectfully request this Court to reconsider the effect of these statutes in light of the congressional pronouncements contained in recent legislation which overturned this Court's decision in *Duro v. Reina*, 495 U.S. 676 (1990), and reaffirmed its clear intent to treat member and non-member Indians within Indian country equally for jurisdictional purposes.

This Court has consistently looked to intervening legislation to interpret Indian legislation. *Bryan v. Itasca County*, 426 U.S. 373, 386 (1976) (stating, "we previously have construed the effect of legislation affecting reservation Indians in light of 'intervening' legislative enactments"). *See Seymour v. Superintendent*, 368 U.S. 351 (1962) (looking to later congressional enactments to interpret an act purportedly diminishing a reservation); *Moe v. Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 479 (1976) (inte ing provisions of the General Allotment Act in light of the later enacted Indian Reorganization Act).

> . . . Federal policy and practice . . . in many instances, established Indian reservations on which several tribes were to be settled under the governance of a single tribal government. . . . Congress has recognized that tribal governments afford a broad array of rights and privileges to non-tribal members. Non-tribal member Indians own property on Indian reservations, their children attend tribal schools, their families receive health care from tribal hospitals and clinics. Federally-administered programs and services are provided to Indian people because of their status as Indians, without regard to whether their tribal membership is the same as their reservation residence. The issue of who is an Indian for purposes of Federal law is well-settled as a function of two hundred years of Constitutional and case law and Federal statutes.

H.R. Rep. No. 938, 101st Cong., 2d sess. 133 (1990).

A decision upholding a state tax on Blaze, a wholly Indian owned company incorporated under the laws of the Blackfeet Tribe, where such tax could not be imposed on a tribal member, would violate the federal government's consistent policy to treat all Indians within Indian country alike.[11] There is no basis to distinguish member

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[11] The State, the State's *amici*, including the United States, and Blaze all fail to recognize the importance of Blaze's Indian character to the outcome of this case. Based on *Colville*, a taxing case, these parties incorrectly conclude that non-member *non-Indians* and non-member *Indians* are always treated similarly for taxing purposes. *See* Pet. Br. at 9 n.11; Resp. Br. in Opp. at 2 n.1; Br. of United States as *Amicus Curiae* at 12 n.5. Although in *Colville*, this Court did state that, "[f]or most practical purposes,

and non-member Indians in the taxing context now that *Duro* has been overruled.[12]

[non-member] Indians stand on the same footing as non-Indians resident on the reservation," 447 U.S. at 161, that statement is not applicable here. That statement was made in the context of an infringement analysis and not in the context of a preemption analysis like that the Court is being asked to perform here.

Under an infringement analysis, non-member Indians and non-Indians are treated similarly because the individual's relationship with the tribe is of central importance to the analysis. Under a preemption analysis, however, the question is instead one of congressional intent. Because the basis for the two tests is different, it would be incorrect to import the holding equating non-member Indians and non-Indians to the preemption analysis.

[12] In *Duro*, major factors leading the Court to find that the tribe lacked criminal jurisdiction over non-members were that non-members were not allowed to vote or hold office, or serve on the tribe's jury. 495 U.S. 688. These are also factors that the Court in *Colville* relied on to find that a state's taxing jurisdiction over non-members was the same as it was over non-Indians. 447 U.S. at 161. Through the ICRA amendments Congress has indicated that tribal courts exercise criminal jurisdiction over non-member Indians even where they do not vote or hold office. These factors should carry even less weight in the context of taxing jurisdiction, an aspect of civil jurisdiction. As *Duro* pointed out, having a say in tribal governments is even more important in the criminal arena than in the civil arena because "a far more direct intrusion on personal liberties" is involved. 495 U.S. at 688.

3. The Federal Government Has a Strong Interest in Promoting Indian Economic Development, Which Includes Protecting the Income and Property of Individual Indians Within Indian Country

The policy of the federal government to promote Indian self-sufficiency and economic development is clearly reflected in statute. For instance, the Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1543, states: "It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians . . . will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n.17 (1983). The policy of promoting the economic development of Indians also underlies the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n, 455-458e, as well as the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479, whose "intent and purpose . . . was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.' " *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934).

Included in the federal government's policy of promoting the economic development of Indians is the protection of the property and income of individual Indians. *See, e.g., McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973) (invalidating a state income tax on a tribal member who lived and earned her income on the reservation.);

Bryan v. Itasca County, 426 U.S. 373 (1976) (invalidating personal property tax on mobile home owned by tribal member residing on the reservation); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976) (invalidating personal property taxes on motor vehicles within reservation). By taxing Blaze, an Indian contractor, the State is diminishing Indian income and property earned wholly within Indian country, in contravention of clear federal policy to promote Indian economic development.

4. The Tribes Have a Significant Interest in Maintaining Their Sovereignty Within Their Territory Free from State Interference

The Supreme Court has clearly articulated that a tribe's interest in maintaining its sovereignty within its territory free from state interference is an interest weighing against state jurisdiction.

> The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the preemption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits.

Bracker, 448 U.S. at 151.

Here, the fact that all activity took place, not only within the boundaries of a reservation, but on trust land,

should indeed weigh heavily against state jurisdiction.[13] On such trust land, the tribal governments all exercise substantial jurisdiction, even over non-members. For instance, tribal governments have the inherent authority to tax non-members as one of their powers of self-government. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). Tribes also have the right to regulate the use of resources by non-members on trust land within tribal jurisdiction. *Montana v. United States*, 450 U.S. 544, 557 (1981); *New Mexico v. Mescalero Apache*, 462 U.S. at 337 (explaining that tribal jurisdiction to regulate resources is also reflected in several federal statutes). Also, tribal courts have jurisdiction over non-members – even for criminal purposes in the case of non-member Indians. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978); ICRA amendments, *supra*.

In addition to the general interest that the tribes have in exercising jurisdiction over Indian country, the tribes

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[13] Here, not only did the activity take place within reservation boundaries, it took place on tribal trust land or on BIA roads. *Arizona v. Blaze Constr. Co.*, 947 P.2d 836, 837 (Ariz. Ct. App. 1997). This Court indicated in *Bracker*, that BIA roads are considered the equivalent of trust land, stating "[f]or purposes of federal pre-emption, however, we see no basis, and respondents point to none, for distinguishing between roads maintained by the Tribe and roads maintained by the Bureau of Indian Affairs." 448 U.S. at 148 n.14. None of the activity here took place on private, non-Indian land, or even on land "equivalent" to non-Indian land. *Cf. Strate v. A-1 Contractors*, 117 S.Ct. 1404, 1413 (1997) (noting that for purposes of tribal jurisdiction over non-Indians, a right-of-way granted to a state for a state highway, is "equivalent . . . to alienated, non-Indian land").

here have a significant interest in the particular road building activity sought to be taxed. The roads are all built on reservation land, with pertinent rights-of-way being granted under and governed by 25 C.F.R. Pt. 169, which requires consent of the affected tribe. Certainly, the Tribes in question have an interest in the infrastructure on their reservations, including that involving roads. As Blaze pointed out below, such roads "make school bus rides safer for Indian children, provide Indians with access to health care and social services, and encourage participation in Tribal governments. The road program also provides jobs and revenue for tribal governments, and the roads encourage economic development." Appellant/Defendant's Opening Brief, at 18, *Arizona v. Blaze Constr. Co., Inc.*, 947 P.2d 836 (Ariz. Ct. App. 1997) (No. 1 CA-TX 96-0010). The proposed tax here will deplete the funds available for the building and repairing of reservation roads. As case law has shown, such an impact is an impact on tribal interests that this Court should consider. *See Bracker*, 448 U.S. at 150 (finding that a state tax would diminish Tribes' revenues "and thus leave the Tribe and its contractors with reduced sums with which to pay out federally required expenses."); *Ramah*, 458 U.S. at 842 (finding that a state tax would deplete the "funds available for the construction of Indian schools.").

B. There is No Significant State Interest to Justify Taxing Jurisdiction

As this Court has held, "any applicable regulatory interest of the State" must be considered in an Indian

preemption analysis. *Bracker*, 448 U.S. at 144. In particular, "[t]he State's interest in exercising its regulatory authority over the activity in question must be examined and given appropriate weight." *Ramah*, 458 U.S. at 838. State interests are examined once a finding is made that the state's asserted regulation, or tax, interferes with federal and tribal interests in order to determine whether there is justification for the interference. By the State's own admission, a finding of interference with federal or tribal interests gives rise to a requirement that there be "corresponding" state services to justify state taxation. Pet. Br. at 21.[14]

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[14] Where there is no interference with federal and tribal interests, the burden on the state to justify state taxes or regulations is greatly reduced. Both *Colville* and *Cotton Petroleum* demonstrate this reduced burden. In both of those cases, the Court first examined whether there were federal or tribal interests in having the activities in question exempted from taxation and found such interests to be lacking. In *Colville*, the Court characterized the activity involved as marketing of a tax exemption and explicitly held that no federal statute or principle of federal Indian law supported or showed an interest in such marketing. In that context, the Court held that the state interest in "preventing the tribes from marketing their tax exemption to nonmembers who do not receive significant tribal services and who would otherwise purchase their cigarettes outside the reservations" and who receive state services, was sufficient. 447 U.S. at 157. *See also Dep't of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994) (likewise involving tax exemption for on-reservation cigarette sales).

In *Cotton Petroleum*, the activity in question was the production of oil and gas by non-Indian lessees. In examining federal and tribal interests, the Court first looked to the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a et seq. and found

The State argues, however, that there is no interference here, and even assuming interference, that the corresponding state services do not need to be direct services. Pet. Br. at 21-25. The State is wrong on both points. As the Court of Appeals properly held, and as this and Blaze's briefs show, there is interference with federal and tribal interests. In the face of this interference, the only remaining question is whether direct state services are required to justify the imposition of a state tax.

Decisions of this Court have consistently held that the state interests that are to be considered in an Indian preemption analysis are those that are directly related to the activity sought to be taxed.

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that it contained no indication that Congress intended to preempt taxation on oil production by lessees. 490 U.S. at 177-180. Looking for historical indications, the Court found an explicit history of Congressional *authorization* of state taxation of oil and gas production on reservations, not exemption. *Id.* at 181 (referencing the Indian Oil Leasing Act of 1924, 43 Stat. 244, 25 U.S.C. § 398). Finally, the Court examined whether the comprehensive federal regulatory scheme had preemptive effect and held that it did not, mainly because the federal scheme was not exclusive but existed concurrently with the state scheme. Because the Court in the first instance found no preemptive federal interest, it did not look substantially into services provided by the state. Even still, the Court did note that the state did provide some direct services and had some direct regulatory interest in the activity being taxed, pointing out that the state provided "substantial services" and "regulate[d] the spacing and mechanical integrity of wells located on the reservation." 490 U.S. at 185-186. The Court summarized by stating that "[t]his is not a case in which the State has had nothing to do with the on-reservation activity, save tax it." 490 U.S. at 186.

In *Bracker*, the Supreme Court first articulated that a state's "generalized interest in raising revenue" would not be sufficient to justify interference with federal and tribal interests. Rather the Court would require more narrowly tailored services or interests. For instance, in *Ramah*, where the question was the state's jurisdiction to tax a non-Indian construction company building an on-reservation school for Indian children, the Court examined whether the state had taken "any responsibility for the education of these Indian children." 458 U.S. at 843. Noting that it hadn't, the Court also questioned whether any of the state interests, as reflected by state services were "in any way related to the construction of schools on Indian land." *Id.* at 845, n.10. The Court explicitly declined to consider any of the services that the state had provided outside of the context of Indian education or school construction, such as off-reservation services. *Id.* at 844 and n.9.

In *New Mexico v. Mescalero Apache*, an analogous case, the question was whether federal law preempted concurrent state regulations of hunting and fishing by non-members on reservation land. The state interests the Court looked to for justification of state regulatory power, even off-reservation interests, were all directly and narrowly related to hunting and fishing. For instance, the Court noted that the state did not contribute to the stocking or maintenance of the reservation wildlife resources. 462 U.S. at 342. Also, the Court looked to whether game wandering off-reservation, or interest in raising revenue through hunting and fishing licenses would give rise to justification for state regulation and found that it did not. *Id.* Specifically, the Court noted that "the State has

pointed to no services it has performed in connection with hunting and fishing by nonmembers. . . . " *Id.* at 343.

No case law has ever refuted the rule that a state must show services or interests directly related to the activity in question in order to justify taxation of activities within Indian country where taxation would interfere with federal and tribal interests. The State's assertion that *Cotton Petroleum* is such a case is incorrect. The State erroneously misapplies *Cotton Petroleum* to support its position. The State asserts that "*Cotton Petroleum* specifically rejected the notion that there must be a *quid pro quo* relationship between a taxpayer and the State." Pet. Br. at 23. However, this principle has no applicability to this case where the very existence of state taxing is what is at issue. Certainly, once it is found that a state has taxing jurisdiction, there needs to be no showing of proportionality between taxes paid and services received as *Cotton Petroleum* held. 490 U.S. at 185 n.15. Where the issue is the existence of state taxing jurisdiction itself, however, *Bracker* and *Ramah* explain that States must show state services or interests directly related to the taxed activity or individual in order to justify the assertion of state jurisdiction. *Cotton Petroleum* in no way undermines these cases.[15]

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[15] In addition, the State relies on the statement in *Cotton Petroleum* that, " 'the relevant services provided by the State include those that are available to the lessees and the members of the Tribe off the reservation as well as on it' " as support for its argument against direct services. Pet. Br. at 23. This reliance is wholly misplaced, however. Quite clearly, the Court looked to off-reservation services only in its analysis of the Indian commerce clause and not in the Indian preemption analysis. Importing principles from one analysis to others is incorrect and unhelpful.

The State can point to no services which would justify the interference with the federal and tribal interests that its tax inflicts. Indeed, this is a case where the state has had "nothing to do with the on-reservation activity, save tax it." *Cotton Petroleum*, 490 U.S. at 163 (1989). In the absence of the required justification, the State lacks jurisdiction to tax the activity here.

CONCLUSION

For the reasons stated above, the decision of the Arizona Court of Appeals that the state taxes are preempted here should be affirmed.

Respectfully submitted,

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